NOTES

LABOR UNIONS AND THE ANTI-TRUST LAW: A REVIEW OF DECISIONS

A review of decisions under the Sherman Anti-Trust Law reveals two ways in which the law has been interpreted. One interpretation emphasizes the prohibition, contained in section two of the act, against attempting to monopolize any part of interstate trade. The other emphasizes the prohibitions found in sections one and three against all contracts or combinations which in any way restrain interstate commerce. The latter way of interpretation is the one according to which the labor unions and other associations of individuals not necessarily engaged in capitalistic enterprises are included within the scope of the present governmental regulations directed against trusts. One of the preconceptions of Congress and the courts has been that competition is the essential condition for industrial progress, and therefore that justice to society demands its conservation. In accordance with this preconception, then, as much as owing to the wording of the law, the courts have interpreted the Sherman Act to apply to labor organizations. But though these organizations may stifle competition in the labor market, and though they may create difficulties for the manufacturers or the carriers, it is not until they interfere in some manner with interstate commerce that they become violators of the Anti-Trust Law. And even then they are proceeded against not because they are labor unions, but because they have done or attempted some act constituting a restraint upon interstate trade. The acts for which they or their members are prosecuted are not necessarily acts peculiar to labor unions, but may be and often are such as a manufacturing concern, a railway, private parties or a single individual could commit and could be prosecuted for committing. From this view-point, however, it would be only a short step to that from which the trade union as such, wherever found in relation to interstate trade, would be considered a trust.

The application of the Sherman Anti-Trust Act to Labor organizations occurred first in 1893 in the cases of *Blindell* v. *Hagan* (February, 1893; 54 F. 40) and *U. S.* v. *Workingmen's Amalga-*

mated Council (March, 1893; 54 F. 995). They were both New Orleans cases, and were heard by the same court. In the first case the court said that the jurisdiction of the circuit court to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from getting a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural and not susceptible of proof.

The Workingmen's Amalgamated Council case was a case where dock-laborers and others had prevented the manning and loading of ships at the port of New Orleans. In this case, as also in the Debs case mentioned below, the court said that the Sherman act was aimed not alone at either capital or contractual evils, but as well at combinations and conspiracies to restrain interstate and foreign commerce by force and violence. The court here further said that a combination of men to compel the employment of only union men becomes a combination in restraint of interstate commerce when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuation of labor in all departments of business, including the transportation of goods from state to state and from foreign nations; and that the fact that a combination of men is in its origin and general purposes lawful is no ground of defense when it undertakes to restrain interstate and foreign commerce. In line with this attitude was the contemporaneous decision in *Waterhouse* v. *Comer* (1893; 55 F. 149) that rule twelve (as it then stood) of the Brotherhood of Locomotive Engineers, providing that engineers employed on roads adjacent to one at war with the Brotherhood shall not handle the property of the offending road in any way profitable to that road until the matters at issue are all settled,[1] was illegal as being in restraint of interstate commerce.

The next year there appeared a group of decisions in which combinations of striking railway workmen and their union leaders, purposing by threats, persuasion, and advice to tie up certain roads and prevent them from carrying passengers and freight, were

[1] But where a trade union seeks by fair means to compel an employer of its members to observe one of its lawful rules, it cannot be restrained therefrom on the ground that its object in enforcing the rule is to create a monopoly of labor in that particular trade.—*Longshore Printing and Publishing Co.* v. *Howell,* 1894; 48 P. 547.

brought under the operation of this Act. The cases in which these decisions were handed down having all arisen as a result of the trouble and strike at Pullman, they are known as "the Pullman Strike Cases." The most widely known case in this group is that of *U. S.* v. *Debs* (64 F. 724). This is really two cases in one, as the opinion of the court refers to proceedings for contempt of court against Eugene V. Debs and others for violations of injunctions which were issued, one on complaint of the United States and another on petition of the receivers of the Atchison, Topeka, and Santa Fé Railroad Company (appointed in a suit against that road on the part of the Union Trust Company). The injunctions mentioned were issued in the summer of 1894 to restrain Debs and all other leaders and members of the American Railway Union, and all those acting with them, from hindering in any way the mail, express, or other business on any of a long list of roads entering Chicago therein mentioned. These men had attempted to prevent and to incite others to prevent the handling of Pullman cars on any road. In this case it was alleged that they had persisted in their policy, which was in restraint of interstate trade, after the injunctions were issued, and the evidence proved such to be the fact. Under the Sherman Act, said the court in this case, "any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful." And where two or more men wrongfully agree among themselves, either for the purpose of creating sympathy in a threatened strike, or for any other purpose, to cause trains carrying mail or interstate commerce to be stopped, or to [cause employers to] discharge their employees or refuse to employ new men, so as to stop such trains, they are guilty of conspiracy. Further, the court said that "if men enter into a conspiracy to do an unlawful thing, and, in order to accomplish their purpose, advise workmen to go upon a strike, knowing that violence and wrong will be the probable outcome, neither in law nor in morals can they escape responsibility." Summing up the evidence, the court said it

> leaves no feature of the case in doubt. The substance of it, briefly stated, is that the defendants, in combination with the members of the American Railway Union and others, who were prevailed upon to co-operate, were engaged in a conspiracy in restraint or hindrance of interstate commerce over the roads entering Chicago, and, in furtherance of their design, those actively engaged in the strike were using threats, violence, and other unlawful means of interference with the operations of the roads; that by the

injunction they were commanded to desist, but, instead of respecting the order, they persisted in their purpose, without essential change of conduct, until compelled to yield to superior force.

By this line of reasoning, and upon this evidence, the defendants were found guilty of contempt in both cases, and the leaders sent to prison. In an appeal to the Supreme Court a writ of habeas corpus was denied without any reconsideration of the scope of the Anti-Trust Act, but on other grounds, so that it is not to be known from this case whether the Supreme Court would hold labor unions under the Act. But in other cases portions of the opinions point directly to such a result, and ten years later we find the Supreme Court actually holding trade unions guilty under the Act.

Another of the series of cases brought against the men who were concerned in various phases of the great railway strike of 1894 was that of *U. S.* v. *Elliott* (62 F. 801 and 64 F. 27). It was an action similar in purpose on the part of the United States to that taken in the Debs case, and in fact Debs and the American Railway Union were named with Elliott and others as defendants. This was, however, merely a suit for injunction to restrain a conspiracy to obstruct and destroy interstate commerce in violation of the Sherman Law, and was not an action to punish the men for contempt of court. The trouble which this case sought to prevent threatened commerce on the roads running out of St. Louis. It is not recorded that the injunction granted by the court in this case was violated; at least Elliott was not later brought into court for contempt. From this case the utterance most pertinent to the present discussion of the application of the Anti-Trust Act to labor organizations, and particularly to railway unions, is that a combination of railway employees to prevent the railroads entering a large city from carrying freight, passengers and mail, and to induce persons to leave the service of such railroads, is within the Act of July 2, 1890.

The case of *Thomas* v. *Phelan,* usually known as *In re Phelan,* under *Thomas* v. *Cincinnati, New Orleans, and Texas Pacific Railway Company* (62 F. 804), presents features similar to both of the preceding cases. Phelan incited railway employees to strike in and around Cincinnati at the same time that they were striking in Chicago and St. Louis, and for the same purpose. He was cited for contempt, because his actions resulted in interference with the conduct of interstate traffic by a receiver, Mr. S. M. Felton, appointed for this railroad by the court in a case brought against

the road by Thomas. An injunction also was sought against Phelan, to keep him from further efforts to tie up the road. The outcome of the case was Phelan's punishment for contempt, the sentence being six months in jail. An injunction was not necessary, since further agitation on his part would only have rendered him liable to further imprisonment; for all interferences with a receiver appointed by a court, just as all violations of the court's injunction, constitute actions in contempt of that court. The general point to be gained from this case is similar to those of the others just cited, with the introduction of an additional consideration, that of wages. A combination to incite all railway employees suddenly to leave their work, with no trouble over terms, in order to starve the railway companies and the public into compelling an owner of cars on the road (i. e., the Pullman Company) to pay his employees more wages, they having no right so to compel him, is an unlawful conspiracy in restraint of commerce within the Act of July 2, 1890. That is, a sympathetic strike by one group of laborers, for the purpose of forcing up the wages of another group, where interstate carriers are affected, is a violation of the Anti-Trust Law.

On July 13, 1894, a grand jury was assembled in San Francisco, where the Southern Pacific Railway terminates, to investigate the tying up of that system by the action of strikers in regard to the use of Pullman cars. In charging the jury (62 F. 840) Judge Morrow, of the Northern District of California, said in effect that any combination preventing by violence and intimidation the passage of railway trains engaged in interstate commerce is in violation of the act of July 2, 1890. An agreement between two or more persons that the employees of railroads carrying mails and interstate commerce should quit, and that all others should, by threats and violence, be prevented from taking their places, constitutes a criminal conspiracy to obstruct the mails and interstate commerce. Essentially these same rulings are found also in the case of *U. S.* v. *Cassidy,* decided the following year (1895, 67 F. 698). This is another Pullman strike case, in which the Anti-Trust Act is applied to the criminal offense of conspiracy to stop the mails and obstruct interstate commerce.

This group of Pullman strike decisions has to do not with the original strike which started the trouble—the strike of employees at the Pullman works—but with a number of sympathetic strikes conducted by the American Railway Union and several of its locals.

It is further to be noted that the main purpose of the agitators and strikers was not to tie up interstate commerce, but was primarily to force the Pullman Company to pay its employees a higher wage. In the pursuit of this end, the methods of "business unionism" demanded the institution of a boycott against the Pullman Company, which derived a great revenue from renting its cars to railroads. One of the most effective phases of the boycott, then, was the attempt to prevent the use of Pullman cars anywhere. Those roads which, like the Great Northern, ran their own sleeping-cars, or which used those of Wagner make, were not interfered with at all. But plainly enough, whatever the purpose of the strikers, the effort to prevent the use of Pullman cars did seriously affect interstate commerce, and all of the lower courts agreed that this was a violation of the Sherman Act. The finding in the only case which reached the Supreme Court was affirmed, without finally settling at this time the scope of the act as regards labor unions, upon the narrower ground that the action of the strikers interfered with United States mails.

In a case against an association of coal dealers in 1898 it was held that where the alleged unlawful combination consists of an unincorporated association, it is sufficient that the association, together with a large number of its members, as individuals and officers of the association, are made defendants (*U. S.* v. *Coal Dealers' Association,* 1898, 85 F. 252). As a labor union is of course an unincorporated association, this decision applies as well to a labor organization. Yet every member of an illegal combination is liable for the injury resulting to the business or property of a plaintiff by reason of such combination (*Atlanta* v. *Chattanooga Foundry Co.,* 1903, 127 F. 23). It will be remembered, however, that a strike or a striking combination is not illegal under the Sherman Anti-Trust Act unless affecting interstate commerce (*Loewe* v. *Lawlor,* 1906, 148 F. 924). This principle explains the fact that most labor organizations to which this Act has been applied are connected with the business of transportation.

Recently the courts have shown a tendency to become more strict and more sweeping in applying the act to labor organizations. The United States Circuit Court in Ohio in 1907 said that a demand by laborers for a "closed shop," or their demand that no person not a member of their union should be employed in the shop, was contrary to public policy (*A. R. Barnes & Co.* v. *Berry,* 1907, 156 F. 62);

and now the general attitude seems to be, as stated by the Supreme Court in a 1908 case about to be treated (cf. also *Northern Securities Co.* v. *U. S.*, 1904, 193 U. S. 311), that any combination whatever to secure action which obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a firm to engage in business, is in violation of the act of July 2, 1890 (the Sherman Act).

The case of *Loewe* v. *Lawlor,* popularly known as the Danbury Hatters' case, is one of the most famous cases in which labor unions were brought within the scope of the Sherman Law. Loewe & Co., manufacturers of hats in Danbury, Conn., had most of their patronage in other states. The men employed in the Loewe shops attempted to have their union recognized by the Loewe company; to force the Loewes to adopt a "closed-shop" policy; to gain a voice in the conduct of the business, and to force the use of the union label on all Loewe hats. The trouble was of several years' duration (see *Loewe* v. *Lawlor,* 1904, 130 F. 633; 1905, 142 F. 216), the refusal of the Loewe company to accede to the demands of the union resulting in the declaration of a boycott against the company and its output of hats, in 1902, by the United Hatters of North America, a national union affiliated with the American Federation of Labor, and assisted by the Federation on this occasion. In the prosecution of this boycott the unionists went to some lengths to destroy the trade of the Loewe company. The company sought an injunction restraining the Hatters from interfering with their business; and before long the case resolved itself into an attempt on the part of the Loewes to gain protection through the Anti-Trust Act, and to hold Lawlor and others liable, under that Act, as unionists, interfering with interstate commerce.

The final decision of the Danbury Hatters' case was given in the Supreme Court, February 3, 1908 (208 U. S. 274). The court was quite emphatic in its application of the Anti-Trust Law. Concerning the status of individuals restraining interstate commerce, and the point of view to be taken toward a series of restraining acts, the court repeated a statement it had made two years before in the case of *Swift* v. *U. S.* (1905; 196 U. S. 375). It applies generally. It is that a combination may be in restraint of interstate trade and within the meaning of the Act of July 2, 1890, although the persons exercising the restraint may not themselves be engaged in interstate commerce; and some of the means employed may be acts within a

state, and individually beyond the scope of federal authority, and operating to destroy intrastate as well as interstate trade; but the acts must be considered as a whole, and if the purposes are to prevent interstate transportation the plan is open to condemnation under the Anti-Trust Act. The court further ruled, in a way which applies very definitely to labor organizations, especially in view of their modern methods of seeking their ends, that a combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other states, to unionize his shops, and on his refusal to do so to boycott his goods and prevent their sale in states other than his own until such time as the resulting damage forces him to comply with their demands, is, under the conditions of this case, a combination in restraint of interstate trade or commerce within the meaning of the Sherman Act, and the manufacturer may maintain an action for damages under section seven of the Act.

The Anti-Trust Act makes no distinction between classes of persons. Organizations of farmers and laborers were not exempted from its operation, notwithstanding the efforts which the records of Congress show were made in that direction. Indeed, this inclusion was intentional. After calling attention to these facts, the Supreme Court went further in the Hatters' case, perhaps, than ever before, regarding the breadth of application of this law. The courts, it should be noted, have clearly shown an inclination to cling to the notion that the Anti-Trust Law consists substantially of a specific application of the common law and does not go much farther. It may also be noted that actual developments in litigation under the Act have seemed to go farther, and to possess more severe possibilities, than the courts had admitted being aware of. But in a portion of the opinion in the Hatters' case we find one exception to the studied conservative attitude previously noticed. Here the court allows its written words to coincide with the facts, as regards the practical workings of the law, as shown by the collection of various earlier cases decided under the Sherman Law, when it says that *this Act has a broader application than the prohibition of restraints of trade unlawful at common law* (*Loewe* v. *Lawlor,* 1908, 208 U. S. 274). In explanation of this assertion, the court says also that the Act prohibits any obstruction which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business; and

this includes restrictions of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes. Of course it is seen at a glance that this statement by the court is very general; but it is important to us here in this connection because it was first uttered in, and called forth by, a labor case under the Sherman Law; and because, by reason of its very generality, it makes this law so readily applicable to almost any union labor movement, large or small.

It has been noted that, although the courts have not yet declared a trade union, as such, to be a trust, it would be only a short step to the adoption of that attitude. Pertinent in this connection is the decision, given November 20, 1909, in the United States Circuit Court for the eastern district of Missouri, against the Standard Oil Company. In the decision Judge Sanborn emphasizes what has already been stated many times in cases under the Anti-Trust Law. "If the necessary effect of a contract, combination, or conspiracy is to stifle, or directly and substantially to restrict free competition in commerce among the states or with foreign nations, it is a contract, combination or conspiracy in restraint of that trade, and it violates this law." Then he adds "And the power to restrict competition in interstate and international commerce vested in a person or in an association of persons by a contract or combination is indicative of its character, for it is to the interest of the parties that such a power should be exercised and the presumption is that it will be." Judge Hook, in a concurring opinion, further emphasizes the idea that anything which prevents naturally competitive organizations from competing is in violation of the Sherman Act. In view of these declarations in the Standard Oil Decision, so recently published throughout the country, the question has been raised whether a labor union as such does not actually come within the definition of combinations inherently illegal. Whether it does or does not seems to depend partly upon whether the courts will hold that an attempt to create a monopoly of labor in any trade or group of trades is an attempt to monopolize any part of interstate commerce, and more particularly on whether the Supreme Court will affirm that the *possession of the power* to restrain interstate commerce (which undoubtedly rests to some degree in every person and organization connected with the industrial life of our country) *is indicative of the exercise of that power*, or, in other words, that the possession

of such power points to the presumption that it will be exercised. The indications are that the Supreme Court will not soon go to such an extreme. Meanwhile the labor union, as such, is not in violation of the Anti-Trust Law.

In summary, three facts are to be noted in regard to the relations of the labor unions and the federal Anti-Trust Law. First, nothing in these cases indicates that the union itself is illegal, but the inference is that through the union organization and agencies a conspiracy or an action in restraint of trade can readily be fostered. Second, in the application of the Sherman Anti-Trust Act to labor unions in the two groups of enterprises, manufacturing and transportation—productive and distributive—the courts have made it applicable to any union, whether intrastate or interstate, which directly and specifically affects interstate commerce to restrain it. Third, the logical and consistent holding, by the courts, to the general principles of interpretation of the Sherman Act, already outlined, allowed of no other result in these labor cases.

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WASHINGTON NOTES

THE NEW RAILROAD PROGRAMME
CONTROL OF CAPITALIZATION, ETC.
FEDERAL INCORPORATION
READJUSTING CIRCULATION TAXES
PUBLIC LAND LEGISLATION
A STUDY OF NATIONAL BANKS

The first positive indication of the economic policy of President Taft has been given in a special message to Congress, under date of January 7, in which are discussed the questions of railroad control and federal incorporation (*House Doc. 484*, 61st Cong., 2d Sess.). This event is the more notable because of the failure of the President in his first annual message, presented at the opening of Congress, to afford definite indications of his ideas upon the more controverted issues of national politics; and because of the subsequent doubt and hesitation which have surrounded the development of the administration's plans. As now presented, the scheme is of decidedly radical character, transcending, in its application to